

# **JOINT COMMITTEE ON ADMINISTRATIVE RULES**

ILLINOIS GENERAL ASSEMBLY

CO-CHAIR:  
SEN. DON HARMON

CO-CHAIR:  
REP. TIM SCHMITZ

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SEN. TONY MUÑOZ  
SEN. SUE REZIN  
SEN. DALE A. RIGHTER  
SEN. IRA SILVERSTEIN  
REP. GREG HARRIS  
REP. LOU LANG  
REP. DAVID R. LEITCH  
REP. DONALD L. MOFFITT  
REP. ANDRÉ THAPEDI

## **MINUTES**

**June 17, 2014**

### **MEETING CALLED TO ORDER**

The Joint Committee on Administrative Rules met on June 17, 2014 at 11:00 a.m. in Room 600C of the Michael A. Bilandic Building, Chicago, Illinois.

Co-Chair Harmon called the meeting to order and announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee hearings. Other persons are encouraged to submit their comments in writing.

### **ATTENDANCE ROLL CALL**

|                           |                                  |
|---------------------------|----------------------------------|
| X Senator Pamela Althoff  | X Representative Greg Harris     |
| X Senator Don Harmon      | X Representative Lou Lang        |
| X Senator Tony Muñoz      | X Representative David Leitch    |
| X Senator Sue Rezin       | X Representative Donald Moffitt  |
| Senator Dale Righter      | X Representative Timothy Schmitz |
| X Senator Ira Silverstein | Representative André Thapedi     |

### **APPROVAL OF THE MINUTES OF THE FEBRUARY 18, 2014 MEETING**

Representative Moffitt moved, seconded by Senator Rezin, that the minutes of the May 20, 2014 meeting be approved. The motion passed unanimously.

### **REVIEW OF AGENCY RULEMAKINGS**

*Department of Human Services – Rules of Conduct, Discipline, Suspension and Discharge Procedures (89 Ill. Adm. Code 827; 38 Ill. Reg. 4292)*

Representative Leitch moved, seconded by Senator Althoff, that JCAR and DHS agree to extend the Second Notice period for the rulemaking for an additional 45 days so that outstanding issues can be addressed. The motion passed unanimously.

## **AGENCY RESPONSES**

*Department of Revenue – Home Rule County Retailers' Occupation Tax (86 Ill. Adm. Code 220; 38 Ill. Reg. 4047) (Emergency); Home Rule Municipal Retailers' Occupation Tax (86 Ill. Adm. Code 270; 38 Ill. Reg. 4060) (Emergency); Regional Transportation Authority Retailers' Occupation Tax (86 Ill. Adm. Code 320; 38 Ill. Reg. 4073) (Emergency); Metro East Mass Transit District Retailers' Occupation Tax (86 Ill. Adm. Code 370; 38 Ill. Reg. 4086) (Emergency); Metro-East Park and Recreation District Retailers' Occupation Tax (86 Ill. Adm. Code 395; 38 Ill. Reg. 4099) (Emergency); County Water Commission Retailer's Occupation Tax (86 Ill. Adm. Code 630; 38 Ill. Reg. 4112) (Emergency); Special County Retailers' Occupation Tax for Public Safety (86 Ill. Adm. Code 670; 38 Ill. Reg. 4125) (Emergency); Salem Civic Center Retailers' Occupation Tax (86 Ill. Adm. Code 690; 38 Ill. Reg. 4138) (Emergency); Non-Home Rule Municipal Retailers' Occupation Tax (86 Ill. Adm. Code 693; 38 Ill. Reg. 4151) (Emergency); County Motor Fuel Tax (86 Ill. Adm. Code 695; 38 Ill. Reg. 4164) (Emergency)*

*Department of State Police – Firearm Concealed Carry Act Procedures (20 Ill. Adm. Code 1231; 38 Ill. Reg. 9703) (Emergency)*

Due to the appropriateness of the agencies' responses, no further action.

## **CONSIDERATION OF OTHER RULEMAKINGS**

*Department of Human Services – Partner Abuse Intervention (89 Ill. Adm. Code 501; 37 Ill. Reg. 19437 and 19457)*

Representative Schmitz moved, seconded by Senator Althoff, that JCAR object to and prohibit the filing of the rulemakings because the rulemakings make assumptions and generalizations that may be unfounded and, thus, would not be appropriate for State administrative law. JCAR believes proceeding with the two rulemakings is not in the public interest. The motion passed 8-2-0. (Senator Harmon and Representative Harris voted No.)

Senator Harmon noted that the Department anticipated revising the rulemaking for later JCAR consideration.

*Department of Revenue – Home Rule County Retailers' Occupation Tax (86 Ill. Adm. Code 220; 38 Ill. Reg. 6549); Home Rule Municipal Retailers' Occupation Tax (86 Ill. Adm. Code 270; 38 Ill. Reg. 6562); Regional Transportation Authority Retailers' Occupation Tax (86 Ill. Adm. Code 320; 38 Ill. Reg. 6575); Metro East Mass Transit District Retailers' Occupation Tax (86 Ill. Adm. Code 370; 38 Ill. Reg. 6588); Metro-East Park and Recreation District Retailers' Occupation Tax (86 Ill. Adm. Code 395; 38 Ill. Reg. 6601); County Water Commission Retailers' Occupation Tax (86 Ill. Adm. Code 630; 38 Ill. Reg. 6614); Special County Retailers' Occupation Tax for Public Safety (86 Ill. Adm. Code 670; 38 Ill. Reg. 6627); Salem Civic Center Retailers' Occupation Tax (86 Ill. Adm. Code 690; 38 Ill. Reg. 6640); Non-Home Rule Municipal Retailers' Occupation Tax (86 Ill. Adm. Code 693; 38 Ill. Reg. 6653); County Motor Fuel Tax (86 Ill. Adm. Code 695; 38 Ill. Reg. 6666)*

Paul Berks, Deputy General Counsel, and Jim Nichelson, Director of Legislative Affairs, represented the Department.

Representative Lang: I'm concerned that we have rules in front of us that are opposed by the City of Chicago, the RTA, and many other groups. I still believe the rules are confusing and not structured well. And I don't know what the courts will do with them. Your rules will receive a Certificate of No Objection today because there aren't sufficient votes to prohibit them, but I do have some questions. First, are you going to agree to work with all of the parties who have outstanding issues to try to resolve those concerns?

Mr. Berks: Yes.

Representative Lang: I am concerned that the test in these rules can still be manipulated to the point that we'll continue to see sham offices outside the RTA region and Cook County. Second question, the Supreme Court stated in *Hartney* that we're supposed to be looking at the totality of circumstances and analyzing all of a retailer's selling activity. Yet, under the Primary Factors section of your rules, you are only examining 3 selling activities. This does not appear to be the totality of the circumstances.

Mr. Berks: I disagree that this was the holding of *Hartney*. *Hartney* held that our prior regulation, which allowed sourcing based on one potentially insignificant factor, was contrary to the governing legal standard and the intent of the General Assembly. So the court looked to a composite of the selling activities and determined that the sale must be sourced to the place where there's some correlation between the selling activities and the use of government services. I think that's the holding of *Hartney*, and I think we've satisfied that, since, under this rule, no retailer would be able to source a sale based on one insignificant factor. The primary selling activities chosen, moreover, are excellent proxies for the seller's use of government services, so this rule is consistent both with the holding and the underlying principles of *Hartney*.

Representative Lang: Wouldn't it be possible for a retailer to satisfy all 3 of your primary factors and still create a sham office somewhere else?

Mr. Berks: No. It is true that you would not have to source your inventory or headquarters if you had a *bona fide* sales office in another location. What's a *bona fide* sales office? A place where you have sales personnel who close the deal – genuine sales personnel with the discretion to act on behalf of the employer and bind that employer to a sale that the salesperson has solicited and negotiated on his or her own. I don't think that's manipulation. If you've got a real sales office somewhere, you should be able to source sales made by that office.

Representative Lang: Even if a retailer is headquartered in one community, has a giant warehouse in another, and in a third has a single desk with a single salesperson?

Mr. Berks: We need an administrable standard. And we can't send auditors out there to measure the government services consumed by each office. We have to look at sales activity. And we can't stop a retailer from deciding where to engage in business. If they're sourcing to one of the 3

locations mentioned under Primary Factors, it's not administrable to start figuring out which of the 3 locations uses more government services, since they all use some.

Representative Lang: What's to prohibit a Chicago retailer from entering into a long-term contract in, say, Channahon meeting factors A, B and C, but then going back to Chicago once the contract is signed and never returning to Channahon?

Mr. Berks: There are 2 things in the rule that prevent this manipulation: (1) We don't have a long-term contract provision in the rule, because each long-term contract is different. If there are subsequent orders placed on that contract, then we can examine each of those orders to see if the sourcing is the same. (2) Subsection (b)(6) of the rules, our "substance over form" provision, gives us express and specific authority to investigate a retailer's claims to root out any shams.

Representative Lang: Why do you address Internet sales in these rules at all, especially since we don't have any statutes about how to source Internet sales?

Mr. Berks: Every seller has to source its sales. Internet sales represent a large segment of the retail sector, and need sourcing guidance too. However, the usual standards don't dovetail with how online retailers do business. All we're doing is starting with the presumption of use tax, which is distributed to local communities across the State rather than to a particular community; we're trying to eliminate the incentive to manipulate tax sourcing by converting use tax liability to retailer's occupation tax liability. We have the presumption because it's often hard to tell where selling activities take place; we have the exceptions because sometimes it is possible to tell where they take place.

Representative Lang: Shouldn't we be trying to create rules that would site as many of these sales as possible in the State of Illinois, rather than starting from the presumption that they're out-of-state sales?

Mr. Berks: The distinction between an out-of-state online seller and an in-state online seller really doesn't make a difference.

Senator Rezin: To which rules will you hold retailers accountable, the emergency rules or these proposed rules?

Mr. Berks: For the period that the emergency rules were in place, they were the law; when these permanent rules are adopted, they will be the law. Now, clearly there's going to be some transition period since systems and sourcing regimens can't be changed on a dime. DOR has provided some notice of the changes going forward, and when audits are performed, there will be some leniency exercised for retailers who made good faith efforts to comply with *Hartney*, then the emergency rules, then the permanent rules.

Representative Lang moved, seconded by Senator Rezin, that JCAR recommend that the Department continue to work with the affected taxpayers and local governments in an attempt to mitigate remaining concerns with the proposed language. The motion passed unanimously.

## **CERTIFICATION OF NO OBJECTION**

Senator Muñoz moved, seconded by Senator Althoff, that the Committee inform the agencies to whose rulemakings the Committee did not vote an Objection or an Extension, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based upon the Agreements for modification of the rulemakings made by the agencies, no Objections will be issued. The motion passed unanimously, except that Representative Schmitz voted "No" on Tabs 28-37 (DOR ROT sourcing rulemakings).

## **JULY MEETING DATE**

Co-Chair Harmon announced that the next monthly meeting is scheduled for Tuesday, July 15, 2014 at 11:00 a.m., Room 600C, Michael A. Bilandic Building, Chicago IL.

## **ADJOURNMENT**

Representative Moffitt moved, seconded by Senator Rezin, that the meeting stand adjourned. The motion passed unanimously.

*Min:0614Jun*